

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD MARTIN,

Plaintiff,

v.

MICHAEL J. ASTRUE,¹
Commissioner of Social Security,

Defendant.

CASE NO. C06-684-MJP-MJB

REPORT AND RECOMMENDATION

Plaintiff Richard Martin appeals to the United States District Court from a final decision of the Commissioner of the Social Security Administration (the “Commissioner”) denying his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act. For the reasons set forth below, it is recommended that the Commissioner’s decisions be REVERSED and this matter REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings.

¹Michael J. Astrue, who was sworn in as Commissioner of Social Security on February 12, 2007, is substituted as the defendant pursuant to F.R.C.P. 25(d)(1) and 42 U.S.C. § 405(g).

I. PROCEDURAL HISTORY

Plaintiff protectively filed an application for DIB and SSI in August 2002. Tr. 64. He alleges disability since July 16, 2002, identifying his impairments as pain in his hands, wrists, shoulders, spine, neck, left hip and knees, numbness, headaches, fatigue, blurry vision, and depression. Tr. 64, 81, 95. The Social Security Administration denied Plaintiff's application initially and upon reconsideration. Tr. 26, 28, 34, 37. A hearing was held before Administrative Law Judge ("ALJ") Arthur Joyner on April 8, 2005. Tr. 25, 298. Plaintiff, who was represented by counsel, testified at the hearing. Tr. 302- 321. A medical expert, Charles Slater, Ph.D., and a vocational expert, Leta Berkshire, also testified at the hearing. Tr. 321-336. The ALJ issued an unfavorable decision on August 3, 2005, finding that Plaintiff was not disabled. Tr. 17-25. On March 20, 2006, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner. Tr. 6-8. Plaintiff timely filed his appeal with this Court.

II. THE PARTIES' POSITIONS

Plaintiff asks the Court to reverse the Commissioner's decision and remand for an award of benefits because the ALJ's medical expert testified that Plaintiff was disabled at step three, and the ALJ failed to provide legally sufficient reasons for rejecting that opinion. Dkt. #12 at 6-11. Alternatively, Plaintiff asks the Court to reverse and remand this matter for further administrative proceedings so that an ALJ can fairly and properly evaluate the medical expert's opinion, and because the ALJ: (1) failed to adequately evaluate evidence that Plaintiff had a significantly limited ability to respond appropriately to supervisors; (2) erroneously rejected the opinions of two examining mental health professionals; (3) failed to give legally sufficient reasons for rejecting non-examining state-agency physician Dr. Hoskin's opinion that Plaintiff could not perform repetitive fingering; (4) misapplied 20 C.F.R. 404.1530 (2006), the failure-to

REPORT AND RECOMMENDATION

Page - 2

1 follow-prescribed-treatment regulation; (5) failed to provide clear and convincing reasons for
2 finding Plaintiff not credible; and (6) failed to comply with SSR 00-44p, which requires an ALJ
3 to ask a vocational expert whether his or her testimony is consistent with the Dictionary of
4 Occupational Titles ("DOT"). *Id.* at 12-23.

5 The Commissioner agrees that the ALJ erred in evaluating Plaintiff's DIB and SSI
6 applications and that the ALJ's errors compel reversal of his decision. Dkt. #16 at 6. However,
7 the Commissioner argues that this matter should be remanded for further administrative
8 proceedings because there are unresolved issues and the record does not clearly require a
9 finding of disability.² *Id.* The Commissioner seeks further proceedings so that the ALJ will: (1)
10 fully address and explain the weight assigned to the medical expert's opinion; (2) if necessary,
11 obtain supplemental medical expert testimony; and (3) if the decision proceeds beyond step
12 three of the sequential evaluation, then reassess the claimant's residual functional capacity, and,
13 if warranted by the expanded record, obtain supplemental vocational expert evidence. *Id.* at 8.

14 III. SUMMARY OF RECORD EVIDENCE

15 Plaintiff was 30 years old at the onset of the alleged disability. Tr. 64. He has a high
16 school education (Tr. 87), and prior work as an artist, carpenter's aid, cook, dishwasher,
17 painter, janitor, delivery driver, auto mechanic, material handler, window assembler, parts
18 salvager, and construction laborer. (Tr. 69-75, 82, 94, 106-12). Other evidence relevant to
19 Plaintiff's claims is incorporated into the discussion below.

20 THE ALJ'S DECISION

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23 ²The Commissioner contends that: (1) the ALJ addressed only portions of the medical expert's
24 testimony; (2) the ALJ provided no rationale explaining how he determined the claimant's limitations in the
25 broad areas of functioning; and 3) the ALJ found that Plaintiff had no severe physical impairment, yet
26 provided no rationale for the RFC limitation to light exertion. Dkt. #16 at 8.

1 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity
2 since the alleged onset date. Tr. 18, 24. At step two, the ALJ identified Plaintiff's severe
3 impairments as a depressive disorder with psychosis and a somatoform disorder. *Id.* At step
4 three, the ALJ determined that Plaintiff's impairments did not meet or equal the criteria of any
5 impairment in the Listings. *See* Tr. 18, 24. At step four, the ALJ found that Plaintiff retains the
6 residual functional capacity to perform light work. Tr. 22, 24. Additionally, the ALJ found that
7 Plaintiff can perform detailed but not complex tasks, he should have limited contact with co-
8 workers and no contact with the public, and he has no other significant limitations. Tr. 23, 24.
9 The ALJ also found that Plaintiff could not perform his past relevant work. Tr. 23, 24. In
10 making these findings, the ALJ determined that Plaintiff's statements concerning his
11 impairments and their impact on his ability to work are not entirely credible. Tr. 22, 24. At
12 step five, the ALJ found that although Plaintiff is unable to perform a full range of light work,
13 he is capable of unskilled jobs such as laundry worker folder, parking meter coin collector, and
14 hotel/motel housekeeper. Tr. 23, 24. Accordingly, the ALJ concluded that Plaintiff is not
15 under a disability as defined in the Social Security Act. *Id.*

16 V. STANDARD OF REVIEW

17 The court may set aside the Commissioner's denial of social security disability benefits
18 when the ALJ's findings are based on legal error or not supported by substantial evidence in the
19 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is
20 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence
21 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,
22 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving
23 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d
24 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than

25 REPORT AND RECOMMENDATION

26 Page - 4

one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

VI. DISCUSSION

The parties agree that the Commissioner's decision should be reversed. Thus, the principle issue here is whether to remand for an award of benefits or for further administrative proceedings. This Court may direct an award of benefits where the record has been fully developed and where administrative proceedings would serve no useful purpose. *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989). Specifically, in determining when evidence should be credited and an immediate award of benefits directed, this Court applies the following test:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The decision to remand for further administrative proceedings depends on the utility of such proceedings. *Harman*, 211 F.3d at 1179.

Plaintiff claims that this case should be remanded for an award of benefits because the ALJ's medical expert ("ME"), Dr. Slater, testified that Plaintiff was disabled at step three, and the ALJ failed to provide legally significant reasons for rejecting the ME's opinion. The Commissioner does not directly respond to this claim. Instead, the Commissioner argues that remand for further proceedings is appropriate because the ALJ addressed only portions of the ME's testimony. For the reasons discussed below, this Court concludes that step two of the *Smolen* test is not met; therefore, remand for further administrative proceedings is appropriate in this case.

A. ALJ's Assessment of the ME's Testimony

REPORT AND RECOMMENDATION

1 In this case, the ME did not expressly state that Plaintiff was disabled at step three.³
 2 However, the ME's overall testimony implicitly supports that conclusion.⁴ First, he opined that
 3 "at one place or another in the record" there is: (a) under 12.04 (Affective Disorders) -
 4 depressive syndrome characterized by anhedonia or pervasive loss of interest in almost all
 5 activities, sleep disturbance, decreased energy, difficulty concentrating or thinking, or thoughts
 6 of suicide, and at least one visual hallucination; (b) under 12.06 (Anxiety-Related Disorders) -
 7 anxiety NOS; (c) under 12.07 (Somatoform Disorders) - pain disorder with medical,
 8 psychologic factors; and (d) under 12.08 (Personality Disorders) - paranoid personality disorder
 9 with pathologically inappropriate suspiciousness or hostility, persistent disturbances of mood or
 10 affect, pathological dependence, passivity, or aggressivity, and impulsive and damaging
 11 behavior. Tr. 322-23. For the "B" criteria, commenting only on the psychological at the ALJ's
 12 direction, the ME opined that Plaintiff has a moderate degree of functional limitation in his
 13 activities of daily living; marked limitation in maintaining social functioning; marked limitation in
 14 maintaining concentration and moderate limitation in maintaining persistence or pace; and no
 15 episodes of decompensation. Tr. 323. Regarding the "C" criteria, the ME testified that "with

18 ³This Court notes that in testifying about Plaintiff's impairments, the ME appears to make
 19 abbreviated references to the mental disorder categories and the "B" and "C" criteria of the Listings as
 20 represented on a Psychiatric Review Technique Form ("PRTF"). See Tr. 321-23. Thus, for purposes of
 21 clarity in discussing the ME's opinion, the Court has substituted the relevant text from the PRTF in place
 22 of the ME's abbreviated references.

23 ⁴While Plaintiff maintains that his condition satisfies the requirements of Listings 12.04, 12.05,
 24 12.07, and 12.08, he focused his analysis on Listings 12.04 and 12.07 because the ALJ accepted that he
 25 has depression and a somatoform disorder. Dkt. #12 at 7-8. Listing 12.04 is met when the requirements in
 26 A (a set of medical findings) and B (a set of impairment-related functional limitations) are satisfied, or
 when the requirements in C (additional functional criteria) are satisfied. See 20 C.F.R. Pt. 404, Subpt. P,
 App. 1, Sec. 12.04. Listing 12.07 is met when the requirements in both A and B are satisfied. *Id.*, Sec.
 12.07.

1 his psychologic dysfunction,” Plaintiff would satisfy the criteria of Section 1, number 2.⁵ *Id.*

2 Lastly, in response to a question from Plaintiff’s counsel, the ME indicated that Plaintiff’s
3 psychological impairment would go as far back as July of 2002. *Id.*

4 In his decision, the ALJ summarized the ME’s testimony as follows:

5 At the hearing an expert witness, Charles Slater, Ph.D., reviewed the evidence
6 and attended the claimant’s testimony. He stated that the claimant had a severe
7 affective disorder with a long history of anger and rage, and unwillingness to
work on that in a mental health setting. He [the claimant] did not trust people
and did not care about relationships.

8 Tr. 20. The ALJ indicates that he did not “entirely credit” the ME’s opinion based on the
9 following three reasons: (1) the ME “did not offer support from the record”; (2) the record
10 “does not reflect ‘a long history’ of psychiatric symptoms”; and (3) the ME “clearly relied on
11 the claimant’s testimony at the hearing and his subjective statements recorded in the consultative
12 examination report, both of which are unreliable because of the claimant’s lack of credibility.”

13 *Id.*

14 Plaintiff argues that the ALJ’s comments do not constitute legally sufficient reasons for
15 rejecting the ME’s opinion about step three. Plaintiff challenges the ALJ’s first reason because
16 the ME did mention record evidence, and even if the ME did not provide “an elaborate
17 explanation” for his opinion, the ALJ did not ask him a single question. Dkt. #12 at 11. This
18 Court agrees that the ALJ’s first reason was not legally sufficient in that it merely reflects the
19 fact that the ME did not identify supporting evidence in his testimony. However, in describing
20 Plaintiff’s mental impairments, the ME did broadly indicate that evidence of the identified
21 mental impairments was present at “one place or another in the record.” Tr. 322. In this

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23 ⁵Section 1, number 2 of the “C” criteria on the PRTF states “[a] residual disease process that has
24 resulted in such marginal adjustment that even a minimal increase in mental demands or change in the
25 environment would be predicted to cause the individual to decompensate.” *See* Social Security Disability
Claims Handbook (SSDCHBK) § 9:51.

1 context, the ALJ's first reason does not refute the presence of evidence in the record that
2 supports the ME's testimony; instead, it only establishes that such evidence was not specifically
3 discussed. The ALJ's first reason is further diminished by the fact that not only did he fail to
4 ask the ME any questions, but the ALJ also denied the subsequent request by Plaintiff's counsel
5 to ask the ME one more question.⁶ See Tr. 324-326. Plaintiff's counsel indicated that he
6 wanted to ask the ME "if he agrees with Dr. T[h]om's limitations set forth in 13-F," which
7 refers to a medical source statement regarding Plaintiff's ability to do work-related mental
8 activities. Tr. 325; *see also* Tr. 238-40.

9 Plaintiff challenges the legal sufficiency of the ALJ's second reason because the ALJ
10 elsewhere recognized that Plaintiff had a long history of failure to undergo mental health
11 treatment. *Id.* Dkt. #12 at 11. Careful review of the ALJ's second reason shows that
12 Plaintiff's argument here is misdirected. The ALJ's second reason reflects his determination
13 that Plaintiff's medical record does not reflect a "long history" of "psychiatric symptoms." As
14 support for this conclusion, the ALJ expressly notes that "the record is very sparse, consisting
15 of a few treatment note[s] from the claimant's primary physician showing he responded to a
16 limited trial of a[n] antidepressant and two, widely separated psychological evaluations
17 conducted in relationship to claimant's attempt to get monetary benefits." Tr. 20. Thus,
18 although the ALJ recognized several times in his decision that Plaintiff has not sought
19 "psychiatric treatment" (Tr. 19, 20, 21, 22), those references to the lack of treatment are not
20 inconsistent with the ALJ's conclusion that the record is very limited and not reflective of a
21 "long history" of mental impairments.

22 Plaintiff also challenges the legal sufficiency of the ALJ's comment about Plaintiff's lack
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24 ⁶Plaintiff's counsel made this request near the beginning of the ALJ's questioning of the vocational
25 expert, who testified immediately after the ME.

1 of credibility because the ALJ did not mention which of Plaintiff's statements about his mental
 2 condition were false or exaggerated. Dkt. #12 at 11. However, while the ALJ did not explain
 3 the basis for rejecting Plaintiff's credibility during his assessment of the ME's opinion, the ALJ's
 4 decision later identifies reasons why he found Plaintiff's testimony to be exaggerated and
 5 unreliable. Tr. 22. Among those reasons, the ALJ points out that although Plaintiff testified
 6 that he took anti-depressants but they did not work, his doctor reported that they did work and
 7 Plaintiff's depression improved to the point that the diagnosis was dropped from his chart. *Id.*
 8 The ALJ also notes that Plaintiff has not had psychiatric therapy and has taken no medication.
 9 *Id.* These reasons, which are plainly related to Plaintiff's mental impairments, are supported by
 10 substantial evidence in the record. *See* Tr. 172-188 (showing Plaintiff's depression diagnosis in
 11 August 1982, improvement in his depression starting in September 2002 with use of Celexa, and
 12 the depression diagnosis no longer in his chart in December 2002).

13 Yet, despite the fact that two of the ALJ's three reasons appear to be legally sufficient, it
 14 is not clear from the record that the ALJ's reasoning was based on an evaluation of the full
 15 scope of the ME's opinion. The ALJ must consider all relevant evidence and may not select and
 16 discuss only that evidence that favors his ultimate conclusion. *See Herron v. Shalala*, 19 F.3d
 17 329, 333 (7th Cir. 1994); *see also Young v. Secretary of Health and Human Services*, 957 F.2d
 18 386, 393 (7th Cir. 1992) (ALJ must articulate his reason for rejecting evidence "within
 19 reasonable limits" in order for meaningful appellate review).

20 Here, this Court notes that the ALJ's summary of the ME's opinion encompassed only
 21 the ME's narrative basis for the opinion.⁷ More significantly, as argued by both parties, the ALJ

23 ⁷Before stating his opinion, at the ALJ's request, the ME, gave the following narrative basis for his
 24 opinion:

The basis of why I, for . . . the "A" criteria, *the record is long history of, you know,*
anger, and rage, and, and [sic] unwillingness to start to examine that[,] work on that in

1 neither acknowledges or addresses the ME's assessment that Plaintiff's functional limitations
2 include a "marked" degree of limitation in maintaining social functioning and in maintaining
3 concentration. *See* Dkt. #12 at 9-10; Dkt. #16 at 7. Given that "marked" limitation in two of
4 the four broad functional areas clearly satisfies the "B" criteria under Listings 12.04 and 12.07,
5 the ALJ's failure to mention this portion of the ME's opinion makes it impossible for this Court
6 to tell if this significant probative evidence was not credited or simply ignored. The ALJ's
7 failure to address the functional limitations identified by the ME is made even more troublesome
8 by the fact that, without explanation, the ALJ concluded that Plaintiff is only "mildly" limited in
9 activities of daily living; in social functioning; and in concentration, persistence and pace. Tr.
10 21.

11 In light of the above, this Court concludes that there are unresolved issues regarding the
12 ME's testimony. Therefore, remand for further proceedings is appropriate so that: (a) the ALJ
13 can reevaluate the ME's opinion, fully addressing and explaining the weight accorded to the
14 ME's opinion about step three; and (b) if necessary, obtain supplemental testimony from the
15 same ME. If, after reevaluation of the ME's opinion, the decision proceeds beyond step three
16 of the sequential evaluation, then the ALJ shall reassess Plaintiff's residual functional capacity,
17 and if warranted obtain supplemental vocational expert evidence in accordance with the
18 remainder of the discussion.

19 B. Outstanding Issues to Be Resolved

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a mental health setting. He has developed a relatively few remarks in the record of, on
22 [sic] his developmental history, indicate it was pretty poor and, and [sic] full of anger,
23 being taken out on him at times, much of the time. And he developed into a man who has a
24 lot of, as he says, no trust in people, doesn't care about relationships. And those, those
25 result in current, various diagnoses.

26 Tr. 322 (emphasis added).

REPORT AND RECOMMENDATION

Page - 10

Plaintiff has presented six additional claims of error by the ALJ, which the Commissioner failed to address in his response brief. *See supra* Part II. Plaintiff argues that because the Commissioner was unresponsive to these issues, the Court may fairly conclude that the ALJ made the six underlying errors and should not repeat them on remand. Dkt. #17 at 2. Having carefully reviewed the record in light of each claim, this Court concludes that there are outstanding issues to be resolved and remand for further administrative proceedings is appropriate on four of the six claims. Accordingly, on remand, in addition to reevaluating the ME's opinion as discussed in section A *supra*, the ALJ shall:

- Properly evaluate the opinion evidence from Dr. Hammer, Dr. Robinson, Dr. Peterson and Dr. Thom that Plaintiff had a significantly limited ability to respond appropriately to supervisors;
- Properly evaluate the opinion evidence from Dr. Thom and Dr. Hammer that Plaintiff had significant limitation in his ability to respond appropriately to pressures in a usual work setting;
- Reevaluate evidence that Plaintiff had a significant restriction in his ability to perform fine manipulation (fingering); and
- Follow SSR 00-4p which sets out an affirmative duty for the ALJ to ask the VE whether the evidence he or she has provided is consistent with the DOT. *See Prochaska v. Barnhart*, 454 F.3d 731, 735 (7th Cir. 2006).

C. Plaintiff's Remaining Claims

1. *ALJ's Assessment of Plaintiff's Credibility*

Plaintiff claims that substantial evidence does not support the ALJ's adverse credibility finding. Dkt. #12 at 20. He argues that the ALJ erroneously considered him not credible on the ground that he had a poor work record, based on his activities of daily living, and that he did

1 not seek treatment from a psychiatrist. *Id.* at 21. This Court concludes that the ALJ did not
2 err in his assessment of Plaintiff's credibility.

3 The ALJ's reasons for rejecting Plaintiff's testimony must be "clear and convincing,"
4 unless there is affirmative evidence showing that the claimant is malingering. *Swenson v.*
5 *Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989). In assessing credibility, the ALJ may consider, for
6 example: (1) ordinary techniques of credibility evaluations, such as the claimant's reputation for
7 lying and prior inconsistent statements concerning the symptoms; (2) unexplained or
8 inadequately explained failure to seek treatment or to follow a prescribed course of treatment;
9 (3) the claimant's daily activities; and (4) medical evidence tending to discount the severity of
10 subjective claims. *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9th Cir. 2001).

11 Here, the ALJ identified several reasons for finding that Plaintiff's statements about his
12 impairments and limitations were not entirely credible. First, the ALJ noted that despite claims
13 of disabling pain and severe psychiatric symptoms, Plaintiff has neither sought or received
14 medical or psychiatric treatment since January 2003, despite being on GAU and having access
15 to medical coupons. Tr. 22. Although Plaintiff argues that his mental condition interfered with
16 his obtaining mental health treatment (Dkt. #12 at 21), he points to no facts in the record that
17 supports this claim. Moreover, there is no evidence in the record that Plaintiff was ever denied
18 medical or psychiatric treatment, that economic reasons precluded his access to treatment, or
19 that he was unaware of the need for such treatment. Consequently, it was not unreasonable for
20 the ALJ to conclude that Plaintiff's resistance to treatment, while simultaneously reporting
21 chronic pain and depression, suggests that his condition was not as severe as alleged.

22 Next, the ALJ noted that Plaintiff's objective testing and physical examinations have
23 been essentially normal. *Id.* This constitutes a clear and convincing reason because although
24 Plaintiff reported chronic knee-joint pain, chronic shortness of breath, bilateral hand pain, and
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1 back and neck pain, the record is replete with evidence of unremarkable test results. *See* Tr.
2 193 (knee x-rays showed no significant abnormalities), Tr. 194 (chest scans show normal
3 results), Tr. 196-97 (x-rays of hand and joint spaces showed no significant abnormality), and Tr.
4 198-99 (cervical and lumbar x-rays showed mild degenerative changes, normal results).

5 The ALJ further stated that Plaintiff's earning record reflected that he had never worked
6 much, with many years of either part-time or sporadic work and with only 4-6 of the past 15
7 years having income above substantial gainful earnings. The ALJ indicated that this record
8 suggests that rather than being related to a medical impairment, Plaintiff's continuing
9 unemployment was consistent with his lifelong choices. *Id.* Plaintiff challenges the ALJ's
10 interpretation of his work record, arguing that the marginal work record corroborates his claim
11 of disability. However, because Plaintiff's earnings record is subject to more than one
12 reasonable interpretation, this Court finds that the ALJ did not err in relying on his
13 interpretation of this evidence as one of several reasons for the adverse credibility finding. *See*
14 *Sample*, 694 F.2d at 642 (Commissioner's conclusion must be upheld where evidence is subject
15 to more than one rational interpretation).

16 The ALJ also found Plaintiff's testimony exaggerated and unreliable because, as
17 discussed in Section A *supra*, the medical record did not support Plaintiff's claim that when he
18 took anti-depressants they did not work. The ALJ also noted that on the one hand, Plaintiff
19 testified that he does small loads of laundry, vacuums his room, grocery shops and sees friends
20 or family he does not live with, but later Plaintiff asserted he stays alone in a darkened room.
21 *Id.* Because such inconsistency with the objective medical record, as well as internal
22 inconsistency in a claimant's testimony, are properly considered by the ALJ when assessing
23 credibility, these reasons provided a clear and convincing basis for finding Plaintiff not credible.

24 2. *ALJ's Application of 20 C.F.R. § 404.1530*

25 REPORT AND RECOMMENDATION

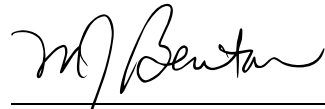
26 Page - 13

1 Plaintiff argues that the ALJ misapplied 20 C.F.R. § 404.1530, the failure-to-follow-
2 prescribed treatment regulation. Plaintiff correctly notes that a determination that the disability
3 criteria are satisfied is a condition precedent to application of this regulation. *See* SSR 82-59
4 (stating the policy and describing the criteria necessary for finding a failure to follow prescribed
5 treatment when evaluating disability). Thus, the ALJ erred in applying § 404.1530 in this case
6 when he had not made a prior determination of disability.

7 VI. CONCLUSION

8 The Commissioner's determination to deny Plaintiff DIB and SSI benefits is not
9 supported by substantial evidence and is not free of legal error. Based on the record evidence,
10 the undersigned recommends that the Commissioner's decision be reversed and remanded for
11 further administrative proceedings, consistent with the the above discussion. A proposed Order
12 accompanies this Report and Recommendation.

13 DATED this 20th day of April, 2007.

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16 MONICA J. BENTON
17 United States Magistrate Judge
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